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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PAUL T. VAN GOMPEL and GEORGIA L. ZEHNER

Appeal 2009-003390
Application 10/750,402
Technology Center 3700

Decided: August 31, 2009

Before TONI R. SCHEINER, DONALD E. ADAMS, and MELANIE L.
McCOLLUM, *Administrative Patent Judges*.

ADAMS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal under 35 U.S.C. § 134 involves claims 34, 38, 39, 43-45, and 48-51, the only claims pending in this application. We have jurisdiction under 35 U.S.C. § 6(b).

STATEMENT OF THE CASE

The claims are directed to a disposable absorbent garment. Claims 34 and 51 are illustrative:

34. A disposable absorbent garment, the disposable absorbent garment comprising:
an elastic outer layer having an outer layer perimeter;
an elastic inner layer, wherein the elastic inner layer has an elastic inner layer perimeter and wherein the elastic inner layer defines an opening located in an internal position to the elastic inner layer perimeter; wherein the elastic inner layer perimeter is bonded to the outer layer perimeter with a plurality of ultrasonic, adhesive or thermal bonds; and
an absorbent assembly positioned between the outer layer and the elastic inner layer, wherein the absorbent assembly includes a topsheet layer, a core layer and a barrier layer.

51. The disposable absorbent garment of claim 34, wherein the disposable absorbent garment has a longitudinal direction and a lateral direction and wherein the absorbent assembly is attached to the outer layer along a lateral centerline of the absorbent assembly.

The Examiner relies on the following evidence:

Van Gompel et al.	US 6,193,701 B1	Feb. 27, 2001
Mishima et al.	US 2002/0072726 A1	Jun. 13, 2002

The rejection presented by the Examiner is as follows:

Claims 34, 38, 39, 43-45, and 48-51 stand rejected under 35 U.S.C § 103(a) as unpatentable over the combination of Van Gompel and Mishima.

We reverse.

ISSUE

Have Appellants established error in the Examiner's prima facie case of obviousness?

FINDINGS OF FACT

FF 1. Appellants' claim 34 requires the following 5 components:

1. An elastic inner layer with an opening,
2. A topsheet layer of an absorbent assembly,
3. A core layer of the absorbent assembly,
4. A barrier layer of the absorbent assembly, and
5. An elastic outer layer.

(Claim 34; *see also* App. Br. 5.)

FF 2. The Examiner finds that Van Gompel teaches a disposable absorbent garment comprising:

1. *An elastic inner layer* (68),
2. *A topsheet layer* (68) of an absorbent assembly (52),
3. *A core layer* (70) of the absorbent assembly (52),
4. *A barrier layer* (64) of an absorbent assembly (52), and
5. *An elastic outer layer* (24).

(Ans. 3-4; *see also* App. Br. 6.)

FF 3. The Examiner finds that Van Gompel fails to teach "an elastic inner layer defining an opening located in an internal position to the elastic inner layer perimeter" (Ans. 4).

FF 4. The Examiner finds that Mishima teaches "an opening in an elastic inner layer so that body waste may be received through the opening of the layer to prevent body waste from sticking to the wearer's skin" (*id.*).

PRINCIPLES OF LAW

“In proceedings before the Patent and Trademark Office, the Examiner bears the burden of establishing a prima facie case of obviousness based upon the prior art.” *In re Fritch*, 972 F.2d 1260, 1265 (Fed. Cir. 1992). On appeal to this Board, Appellants must show that the Examiner has not sustained the required burden. *See Ex parte Yamaguchi*, 88 USPQ2d 1606, 1608 and 1614 (BPAI 2008) (precedential); *Ex parte Fu*, 89 USPQ2d 1115, 1118 and 1123 (BPAI 2008) (precedential).

“The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007). However,

it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does . . . because inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known.

Id. at 418-419.

ANALYSIS

Based on the foregoing findings of fact (FF 2-4) the Examiner concludes that “it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the inner layer of Van Gompel defining an opening as taught by Mishima in order to prevent body waste from sticking to the wearer’s skin” (Ans. 4).

Appellants contend that “Van Gompel discloses only a liquid permeable bodyside liner 68 . . . [and] [t]his single element . . . does not

satisfy both the elastic inner layer and the topsheet layer because these are two distinct claim elements” (App. Br. 6). We agree. The Examiner has relied on Van Gompel’s element 68 to reach both the elastic inner layer and the topsheet layer of Appellants’ claimed invention (Cf. FF 1 and FF 2). Appellants’ claimed invention requires both an elastic inner layer and a topsheet layer, element 68 of Van Gompel’s article cannot serve as both an inner layer and a topsheet layer. Claims 38, 39, 43-45, and 48-51 depend from claim 34.

In response to Appellants’ arguments the Examiner switches horses and states that

The [E]xaminer is not modifying the liner of Van Gompel, the [E]xaminer is adding the inner layer defining an opening as taught by Mishima to the garment of Van Gompel, such that the opening defined by the inner layer of Mishima is located adjacent the skin-facing side of the liner of the absorbent assembly of Van Gompel.

(Ans. 9.) We agree with Appellants’ contention that the Examiner’s statement at page 9 of the Answer is in conflict with the Examiner’s statement of the rejection as set forth on page 4 of the Answer (*see* Reply Br. 4).

Nevertheless, upon review of the Examiner’s reasoning at page 9 of the Answer, the Examiner failed to articulate a reason that would have prompted a person of ordinary skill in the relevant field to combine Mishima’s inner layer with Van Gompel’s article resulting in an article with two inner layers. In this regard, we recognize Appellants’ contention that

Van Gompel states at column 10, lines 4-6 that “Bodyside liner 68 is suitably utilized to help isolate, from the wearer’s skin, the liquids held in absorbent core 70.” . . . To modify the bodyside

liner 68 of Van Gompel with an opening would frustrate the stated purpose of the bodyside liner, that is, to isolate the skin from the core.”

(App. Br. 6-7 (emphasis removed).) “Therefore, [Appellants contend] one skilled in the art would not be motivated to form an opening in the bodyside liner of Van Gompel as suggested” (App. Br. 7 (emphasis removed)). In the absence of evidence or sound reasoning to the contrary, we are compelled to agree with Appellants.

CONCLUSION OF LAW

Appellants established error in the Examiner’s prima facie case of obviousness.

The rejection of claims 34, 38, 39, 43-45, and 48-51 under 35 U.S.C § 103(a) as unpatentable over the combination of Van Gompel and Mishima is reversed.

REVERSED

cdc

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